No. 617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

DISTRICT OF COLUMBIA,
Petitioner

v.

JOHN R. THOMPSON COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE DISTRICT OF COLUMBIA

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OPINIONS BELOW

The opinion of the Municipal Court (R. 4) is not reported. The opinion (R. 25), the concurring opinion (R. 37) and dissenting opinion (R. 52) of the Municipal Court of Appeals are reported at 81 A. 2d 249. The opinion (R. 60), the concurring opinion (R. 89) and dissenting opinion (R. 100) of the United States Court of Appeals have not yet been reported.

JURISDICTION

The judgment of the United States Court of Appeals was entered January 22, 1953 (R. 121). The petition for certiorari filed February 20, 1953, was granted April 6, 1953. Jurisdiction to issue the writ is conferred by Title 28, U. S. Code, Sec. 1254 (1).

STATEMENT OF THE CASE

By "An Act to Provide a Government for the District of Columbia," approved February 21, 1871, 16 Stat. 419, Congress provided a territorial form of government for the territory of the United States within the limits of the District of Columbia. By that Act Congress constituted that government a "body corporate for municipal purposes," and provided in Section 5 thereof

> "That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. * * *".

Section 18 provided:

> "Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

The Legislative Assembly enacted "*An Act regulating restaurants, and other public places, and for other purposes*," approved June 20, 1872, Laws of the District of Columbia, Ch. LI (App. 12), and "*An Act regulating sales*

in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms, and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act," approved June 26, 1873, Laws of the District of Columbia, Ch. XLVI (App. 13). Subsequent to 1873 these Acts of the Legislative Assembly were not enforced. (See opinion of Judge Clagett, footnotes 4 and 5, R. 41, 42). The provisions of the Act of February 21, 1871, providing an executive and a legislative assembly for the District of Columbia were repealed by the Temporary Organic Act of 1874, approved June 20, 1874, 18 Stat. 116.

On August 1, 1950, the Corporation Counsel of the District of Columbia filed in the Municipal Court for the District an information (No. 111019; R. 1) charging John R. Thompson Company, Inc., as a restaurant keeper in the District, with violation of the Acts of the Legislative Assembly of 1872 and 1873—by refusal of service, solely because they were members of the Negro race, to named well-behaved and respectable persons. The information was in four counts, the first charging violation of the Act of 1872, the second, third and fourth with violation of the Act of 1873 (R. 1-3). The Municipal Court, by Judge Frank H. Myers, *sua sponte*, entered an order quashing the information without arraigning the defendant (R. 22) on the ground that the said Acts of the Legislative Assembly had been held by him in an earlier prosecution against the same defendant (No. 99150), alleging similar violations on a different date (R. 17), to have been repealed by implication by the Organic Act of June 11, 1878 (R. 4). The District of Columbia took an appeal from that order to the Municipal Court of Appeals (R. 19).

The Municipal Court of Appeals, as to the first count of the information, affirmed the order of the Municipal Court, Judge Hood being of the view that both the 1872 and 1873 enactments were invalid as beyond the power of the Legislative Assembly (R. 52), Judge Clagett thinking that the 1872 enactment was repealed by the enactment of 1873 "at least so far as restaurants are concerned" (R. 48). As to the second, third and fourth counts of the information, the Municipal Court of Appeals reversed the order of the Municipal Court, Judge Clagett being of the opinion that the 1873 enactment was valid when enacted (R. 47) and that it had never been repealed (R. 52), and Chief Judge Cayton being of the view that both the 1872 and 1873 enactments were valid when enacted (R. 32) and that both were presently enforceable (R. 32-36).

The Thompson Company petitioned the United States Court of Appeals for the District of Columbia Circuit for the allowance of an appeal from the judgment of the Municipal Court of Appeals in so far as it reversed the order of the Municipal Court quashing the information as to the second, third and fourth counts. The District, on its part, petitioned for the allowance of a cross-appeal from the judgment of the Municipal Court of Appeals in so far as it affirmed the order of the Municipal Court in quashing the information as to the first count. The United States Court of Appeals granted both petitions (R. 56), ordered the two appeals consolidated (R. 57) and *sua sponte* ordered the appeal and the cross-appeal heard in banc (R. 58).

The United States Court of Appeals, by a divided Court, affirmed the judgment of the Municipal Court of Appeals as to the first count of the information and reversed the judgment as to the second, third and fourth counts. Chief Judge Stephens and Judge Clark, Judge Miller and Judge Proctor held that the enactments of the Legislative Assembly were of the character of general legislation, the power to enact which the Congress could not constitutionally dele-

gate to the Legislative Assembly, and that the said Acts were repealed by the 1901 Code (R. 85); Judge Prettyman thought it "unnecessary for the court to determine whether the enactments were legislation or were regulatory municipal ordinances" but concurred in the judgment announced by Chief Judge Stephens. His view was "If they (the Acts of 1872 and 1873) were general legislation they were void from the beginning and in any event were repealed by the 1901 Code. If they were municipal ordinances they were long ago abandoned by the regulatory authority which originally adopted them" (R. 99). Judge Miller concurred "in the opinion of Chief Judge Stephens, but if the view that the enactments are regulatory ordinances were accepted," he agreed with what is said in Judge Prettyman's opinion (R. 100). Judge Fahy, Judge Edgerton, Judge Bazelon and Judge Washington dissented on the grounds that the Acts of the Legislative Assembly were local municipal ordinances (R. 102), lawfully adopted under a valid delegation of authority by Congress, and that the Acts of the Legislative Assembly have not been repealed and are presently enforceable (R. 100).

QUESTIONS PRESENTED

In 1872 and 1873 the Legislative Assembly of the District of Columbia enacted two laws which made it a penal offense for the owner of a restaurant in the District of Columbia to refuse service to a person on account of race or color. The Court of Appeals for the District of Columbia Circuit has held that these Acts are "presently unenforceable" (R. 89). The questions presented are:

1. Whether Congress has power under the Constitution to delegate to the District of Columbia authority to enact local anti-discrimination legislation such as the Acts of 1872 and 1873.

2. If Question 1 is answered in the affirmative, whether the

Organic Act of 1871 constituted a delegation of such legislative authority to the Legislative Assembly of the District of Columbia; and whether the Acts of 1872 and 1873 were proper exercises by the Legislative Assembly of the authority granted it in the Organic Act of 1871.

3. If the Acts of 1872 and 1873 are held to have been valid when enacted, whether they are no longer enforceable as having been repealed or "abandoned."

SPECIFICATION OF ERRORS

The United States Court of Appeals for the District of Columbia Circuit erred

(1) In holding that the information could not be validly prosecuted;

(2) In holding that Congress did not have constitutional authority to delegate power to the Legislative Assembly to enact the Acts in question;

(3) In holding that Congress in the Act of 1871 did not effectively and constitutionally delegate to the Legislative Assembly authority to enact the Acts of 1872 and 1873;

(4) In holding that the Acts of the Legislative Assembly are presently unenforceable either because they were repealed or "abandoned";

(5) In holding that the Acts of the Legislative Assembly were invalid when enacted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are printed in the Appendix, *infra*, pp. 1-23.

SUMMARY OF ARGUMENT

The purpose of the Founders in vesting in Congress exclusive legislative authority over the District of Columbia was

to exclude the States from participation in the government of the capital city. But the Founders did not intend to burden Congress with the management of the purely local affairs of the District of Columbia. They assumed that Congress would provide a municipal legislature for local purposes to perform that function.

Upon assuming control of the District of Columbia, Congress continued the then existing City of Georgetown, created a municipal corporation to govern the City of Washington, and authorized the Levy Court to govern the area of the District beyond the boundaries of the two cities. From time to time, in its discretion, Congress enlarged the powers of these municipal governments.

Beginning in 1862, Congress, in the exercise of its exclusive legislative authority over the District of Columbia, determined as its legislative policy that Negroes in the District of Columbia were entitled to full rights of citizenship. By successive enactments, Congress abolished slavery in the District, made Negroes amenable to the same laws as white persons, gave Negroes the right to ride on street cars, and gave qualified Negroes the right to vote at any election in the District of Columbia. On the National level, Congress proposed the 13th Amendment of the Constitution to abolish slavery and the 14th Amendment of the Constitution to give Negroes born or naturalized in the United States the status of citizens of the United States, and those Amendments were adopted.

The Council of the City of Washington, in conformity with the legislative policy of Congress, adopted an ordinance on March 7, 1870 which made it unlawful for proprietors of restaurants and other specified establishments to refuse service to or to exclude any orderly person on account of race or color.

By the Act approved February 21, 1871 Congress abolished the three municipal corporations in the District of Columbia and created a new, single municipal corporation

to govern the entire District of Columbia. To the Legislative Assembly created by that Act Congress delegated legislative authority, employing the language it had used in delegating such authority to the Assemblies of the Territories.

In conformity with the legislative policy which Congress had formulated, the Legislative Assembly enacted the Acts of 1872 and 1873 here in question, making it unlawful for proprietors of restaurants and other establishments to discriminate against Negroes on account of race. The Court of Appeals held that those enactments were of the character of "general legislation," power to enact which Congress could not constitutionally, and did not, delegate to the Legislative Assembly, and that this conclusion required the further conclusion that the Acts of the Legislative Assembly were repealed by the 1901 Code of Law for the District of Columbia.

It is respectfully submitted that both conclusions of the Court of Appeals were erroneous. Under the decisions of this Court, the regulation of private rights, such as the right to patronize an inn or restaurant, is a matter for municipal legislation by the States, and in the District of Columbia is subject to the plenary legislative power of Congress. In the case of the District of Columbia, as in the Territories, Congress can constitutionally delegate to a subordinate legislature as much or as little municipal legislative authority as it sees fit.

Congress unquestionably delegated authority to the Legislative Assembly to enact the two Acts in question. By Section 40 of the Act approved February 21, 1871 Congress provided that the municipal ordinances which had been adopted by the City of Washington should remain in force "until modified or repealed by Congress or the Legislative Assembly of said District." By this provision the ordinance adopted by the Council of Washington on March 7, 1870, which the Court of Appeals noted was "substantially

parallelled" by the Acts of 1872 and 1873, was kept in force and the Legislative Assembly was given authority to enact legislation of that character.

The enactments of the Legislative Assembly did not, as the Court of Appeals concluded, alter the common law. Restaurants were unknown to the common law. The common law predecessors of the restaurant were known as ordinaries and were open to all comers. Congress, however, had materially altered the common law by elevating Negroes to the status of citizens, of people, of members of the public. The enactments of the Legislative Assembly in fact required restaurants to conform with the common law practices of ordinaries by entertaining the public, as that term had been re-defined by the Congressional policy. In any event, the authority which Congress had vested in the Legislative Assembly was sufficient to empower it to alter the common law.

By Section 91 of the Revised Statutes of the District of Columbia Congress in 1874 again kept in force the ordinances of the City of Washington, buf as modified by the Legislative Assembly. In 1874 Congress abolished the Territorial government of the District of Columbia and created in lieu thereof the temporary commission form of government, which it made permanent by the Act approved June 11, 1878. By these last mentioned Acts Congress withdrew from the municipal government all legislative authority, and did not grant legislative power to the Commissioners of the District of Columbia until 1892. Between 1892 and 1901 neither Congress nor the Commissioners of the District of Columbia repealed the Acts of the Legislative Assembly, and they therefore were in force at the time of enactment of the District of Columbia Code of Law of 1901.

The 1901 Code did not repeal the enactments. Section 1636 excepted from repeal Acts of the Legislative Assembly relating to the duties of the Commissioners of the District

of Columbia or their subordinates, and the Acts of 1872 and 1873 imposed duties on the Commissioners, as successors in authority of the Governor of the District of Columbia, and upon the successors in authority of the Register and attorney of the District of Columbia. That section also excepted acts relating to municipal affairs only, and as is demonstrated above, the Acts of 1872 and 1873 were of that character. Section 1640 of the 1901 Code excepted from repeal and kept in force municipal ordinances. The enactments of 1872 and 1873 were nothing more than the ordinance of March 7, 1870, as modified by the Legislative Assembly, and they did not rise to a higher degree of legislative enactment by having been adopted by a city council called a Legislative Assembly. The effect of Section 1640 of the 1901 Code was to keep those enactments in force until Congress itself modifies or repeals them, and this Congress has not done.

ARGUMENT.

1. Congress Could Constitutionally Delegate to the Legislative Assembly Power to Enact the Acts of 1872 and 1873

To determine whether or not the information in this case can be validly prosecuted, two preliminary questions must be answered. As stated by the Court of Appeals, those questions are:

> "* * * The first, were the enactments of the Legislative Assembly of 1872 and 1873 on which the information against the Thompson Company was based within the power of the Assembly; the second, were those enactments repealed." (R. 65)

The Court of Appeals answered the first question by holding (R. 79):

> "* * * the enactments of the Legislative Assembly of 1872 and 1873 which are under question in the instant case were of the character of 'general legislation,' the power to enact which the Congress could not constitu-

> tionally, and did not, delegate to the Legislative Assembly",

and the second by holding (R. 85) that

> "The conclusion reached in the previous topic that the enactments of the Legislative Assembly of 1872 and 1873 are of the character of general legislation requires the further conclusion that they were repealed by the District of Columbia Code of 1901, Act of March 3, 1901. 31 Stat. 1189."

It is respectfully submitted that, in the light of applicable decisions of this Court which were not considered by the Court of Appeals, its first conclusion, and therefore, necessarily, its second, were erroneous.

Article I, Section 8, Clause 17, of the Constitution of the United States, specifically empowers Congress "To exercise exclusive Legislation in all Cases whatsoever, over such District * * * as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *."

In *O'Donoghue* v. *United States*, 289 U. S. 516, 538, in holding that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, the Court contrasted the District clause of the Constitution with the Territorial clause, Art. IV, § 3, cl. 2, and said:

> "In the District clause, unlike the Territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupilage may be constituted, but *an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and incidental.* The District is not an 'ephemeral' subdivision of the 'outlying dominion of the

United States,' but the capital—the very heart—of the Union itself, to be maintained as the 'permanent' abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurable beyond the prophetic vision of those who designed and created it." (Emphasis supplied.)

The Court quoted with approval from the opinion of Circuit Judge, later Mr. Chief Justice, Taft in *Grether* v. *Wright*, 75 Fed. 742, 756-757:

"'It was meet that so powerful a sovereignty should have a local habitation the character of which it might absolutely control, and the government of which it should not share with the states * * *.'".

But while the Founders intended that Congress should not share control of the District of Columbia with the States, they never intended that Congress should be burdened, and its time and attention diverted from National affairs, by the management of the purely local affairs of the District of Columbia. Instead, they assumed that Congress would provide the means for the inhabitants of the ceded territory to perform this function. In No. XLIII of The Federalist (R. 37, 38), James Madison, in explaining the provisions of Article 1, Sec. 8, cl. 17 of the Constitution, said:

"'The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; *as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them;* and as the authority of the legislature of the State, and of the in-

habitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.'" (Emphasis supplied.)

Mr. Madison's assumption that a municipal legislature for local purposes would be allowed the people of the District of Columbia proved to be correct. Shortly after the Government was established in Washington, Congress, by the Act approved May 3, 1802, provided such a government, and from time to time thereafter until 1874, enlarged the powers and authorities granted it. In *Metropolitan Railroad Company v. District of Columbia*, 132 U.S. 1, 4-7, this Court reviewed Congressional enactments providing such municipal governments for the people of the District, as follows:

"On May 3d, 1802, an Act was passed to incorporate the City of Washington. (2 Stat. at L. 195.) It invested the mayor and common council (the latter being elected by the white male inhabitants) with all the usual powers of municipal bodies, such as the power to pass by-laws and ordinances; powers of administration, regulation and taxation; * * *. Various amendments, from time to time, were made to this charter, and additional powers were conferred. A general revision of it was made by Act of Congress passed May 15, 1820. (3 Stat. at L. 583.) A further revision was made and additional powers were given by the Act of May 17, 1848 (9 Stat. at L. 223), but nothing to change the essention character of the corporation.

* * * * * *

"In 1871 an important modification was made in the form of the district government—a Legislature was established, with all the apparatus of a district government. By the Act of February 21st, of that year, entitled 'An Act to Provide a Government for the District of Columbia' (16 Stat. at L. 419), it was enacted (§ 1) that all that part of the territory of the United States included within the limits of the District of Columbia be

created into a government by the name of the District of Columbia, by which name it was constituted 'a *body corporate for municipal purposes,*' with power to make contracts, sue and be sued, and 'to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States.' A governor and Legislature were created; also a board of public works; * * * * . The acts of this board were held to be binding on the municipality of the District in *Barnes* v. *District of Columbia*, 91 U.S. 540. It was regarded as a mere branch of the district government, though appointed by the President and not subject to the control of the district authorities.

"This Constitution lasted until June 20th, 1874, when an Act was passed entitled 'An Act for the Government of the District of Columbia, and for Other Purposes.' (18 Stat. at L. 116.) * *"

The extent of the power of Congress to delegate authority to the municipal government of the District of Columbia was indicated by this Court in *Barnes* v. *District of Columbia*, 91 U. S. 540. In that case, in holding the District of Columbia liable for acts and omissions of the Board of Public Works created by the same Act which created the Legislative Assembly, this Court said (p. 544):

"A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the Legislature shall extend or contract the sphere of its action."

In *Metropolitan Railroad Company* v. *District of Columbia*, 132 U. S. 1, 8, supra, this Court again stated the rule that the extent and scope of local legislative power which may be delegated to a municipal government are within the wisdom of the superior Legislature:

> "All municipal governments are but agencies of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior Legislature sees fit to confer upon them. The form of those agencies and the mode of appointing officials to execute them are matters of legislative discretion."

The case of *Stoutenburgh* v. *Hennick*, 129 U. S. 141, on which the Court of Appeals relied, defined the class of powers which Congress may not delegate. The question presented in that case was whether a section of an Act of the Legislative Assembly which required commercial agents offering merchandise for sale by sample in the District to obtain a license so to do was a valid law when applied to persons soliciting the sale of goods on behalf of firms doing business outside the District. In holding that section of the Act of the Assembly invalid, the Court first stated fundamental principles (p. 147):

> "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority; and hence while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice, subject of course to the interposition of the superior in cases of necessity.
>
> "Congress has express power 'to exercise exclusive

> legislation in all cases whatsoever' over the District of Columbia, thus possessing the combined powers of a general and of a State Government in all cases where legislation is possible. But as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers; and this is all that Congress attempted to do."

The Court then applied those principles to the question presented. Referring to earlier precedents dealing with the scope of the commerce clause, e.g., *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, the Court reaffirmed the exclusive power of Congress over "that class of subjects which calls for uniform rules and national legislation", as distinguished from "that class which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively" (citing *Cooley* v. *Phila. Board of Wardens*, 12 How. 299; and *Gilman* v. *Philadelphia*, 3 Wall. 713). Declaring that that section of the Act of the Legislative Assembly was "* * a regulation of interstate commerce, so far as applicable to persons soliciting, as Hennick was, the sale of goods on behalf of individuals or firms doing business outside the District" the Court held:

> "In our judgment Congress for the reasons given could not have delegated the power to enact the third clause of the 21st section of the Act of Assembly, construed to include business agents such as Hennick, and there is nothing in this record to justify the assumption that it endeavored to do so, for the powers granted to the District were municipal merely, * *"

Chief Judge Stephens stated (R. 79):

> "It is correctly suggested in Roach v. Van Riswick, that, for lack of a precise criterion, the determination of what powers are strictly 'municipal' and may there-

> fore rightly be conferred upon local corporations, and what powers are properly 'legislative' and cannot therefore be delegated, is not always without difficulty."

The Court of Appeals did not define "municipal powers" and did not consider the decisions of this Court in *City of New York* v. *Miln*, 11 Pet. 102, *United States* v. *Cruikshank*, 92 U. S. 542 and the *Civil Rights Cases*, 109 U. S. 3, in which this Court defined "municipal legislation" and "municipal regulation".

In *City of New York* v. *Miln*, 36 U. S. 11 Pet. 102, 139, in holding that a statute of New York requiring the master of every vessel arriving at the port of New York to make a written report concerning every person brought as a passenger is not a regulation of commerce but of police, and within the powers belonging to the States, this Court defined "municipal legislation" as follows:

> "* * * a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive."

In *United States* v. *Cruikshank*, 92 U. S. 542, 553, the Court, referring to the Second Amendment of the Constitu-

tion, adopted the definition of "municipal legislation" stated in *City of New York* v. *Miln*, supra, as follows:

> "This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in City of N. Y. v. Miln, 11 Pet. 139, the 'powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

In the *Civil Rights Cases*, 109 U. S. 3, 12, 19, the Court inferentially adopted the definition of "municipal legislation" made in *City of New York* v. *Miln*, by citing with approval the *Cruikshank* case. Two of the cases decided by this Court in the *Civil Rights Cases* were indictments charging denial to persons of color the accommodations of an inn or hotel in violation of the 1st and 2d sections of the Civil Rights Act approved March 1, 1875, 18 Stat. 335. In holding that those sections of the Act were unconstitutional and void as not being authorized either by the 13th or the 14th Amendment of the Constitution, the Court held respecting the 14th Amendment:

> "It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect

of the Amendment may be found in U. S. v. Cruikshank, 92 U. S., 542; * *"

and at page 19:

"We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. * *[1]

In *Binns* v. *United States*, 194 U. S. 486, 491, this Court emphasized that the Territories and the District of Columbia are subject to the plenary legislation of Congress in every branch of municipal regulation. In affirming a conviction under an Alaska penal statute, the Court said:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories, of a *quasi* state government, with executive, legislative, and judicial officers, and a legislature endowed with the power of local taxation and local expenditures; but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. *It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District.*

[1] In *Butts* v. *Merchants & Miners Transportation Co.*, 230 U. S. 126, the Court rejected the contention that although unconstitutional and void in their application to the States, Sections 1 and 2 of the Civil Rights Act of March 1, 1875, 18 Stat. 335, are valid and effective in all other places within the jurisdiction of the United States, including the District of Columbia. The Court held: "Here it is not possible to separate that which is constitutional from that which is not. * * * They must therefore be adjudged altogether invalid."

It may intrust to them a large volume of legislative power, or it may, by direct legislation, create the whole body of statutory law applicable thereto." (Emphasis supplied.)

There can be no question that Congress can constitutionally delegate municipal power to the fullest extent to the territories of the United States, for in *Simms* v. *Simms*, 175 U. S. 162, 168, this Court held:

> "In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state; and may, at its discretion, intrust that power to the legislative assembly of a territory. *Shively* v. *Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548, and cases cited; *Utter* v. *Franklin*, 172 U. S. 416, 423, 43 L. ed. 498, 500, 19 Sup. Ct. Rep. 183. In the exercise of this power, Congress has enacted that (with certain restrictions not affecting this case) 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.' Rev. Stat. § 1851; act of July 30, 1886, chap. 818, 24 Stat. at L. 170. The power so conferred upon a territorial assembly covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a state, are regulated by the laws of the state only. *Cope* v. *Cope*, 137 U. S. 682, 684, 34 L. ed. 832, 11 Sup. Ct. Rep. 222."

In the cases of *City of New York* v. *Miln*, *United States* v. *Cruikshank* and the *Civil Rights Cases*, this Court used the terms "municipal legislation" and "municipal regulation" to differentiate the powers retained by the States from those surrendered or restrained by the Constitution. In the *Stoutenburgh* case, this Court used the term "municipal powers" to differentiate the powers possessed by Congress as the repository of the powers of a State government over

the District of Columbia from those possessed by Congress as the general or central government.

Clearly, then, the *Stoutenburgh* case does not support the conclusion of the Court of Appeals that Congress could not constitutionally delegate to the Legislative Assembly authority to enact the two Acts here in question. Enactment of such legislation for the District of Columbia is within the plenary power of Congress to legislate on every phase of municipal regulation. *Civil Rights Cases*, supra. Congress therefore could intrust to the Legislative Assembly of the District of Columbia, as it could intrust to the Legislative Assembly of a Territory, authority to enact those Acts or any other municipal legislation, as in its sole discretion is wise and proper. *Binns* v. *United States*, supra; *Simms* v. *Simms*, supra.

Chief Judge Stephens said (R. 81):

> "The enactments are in the nature of civil rights legislation. They undertake to establish in the restaurant business, and in the other businesses named, a policy of equal service without respect to race or color, and to enforce that policy by a fine and license forfeiture."

In *Yakus* v. *United States*, 321 U.S. 414, 424, this Court held:

> "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct * * *."

In the decade preceding creation of the Legislative Assembly Congress had determined the legislative policy by changing the status of the Negro, first in the District of Columbia, and later in the United States. By successive Acts Congress abolished slavery in the District of Columbia,[2]; made Negroes amenable to the same laws and ordinances to

[2] Act approved April 16, 1862, 12 Stat. 376 (App. 4).

which free white persons were subject[3]; gave Negroes the right to ride on street cars in the District of Columbia[4]; gave Negroes the right to vote at any election in the District[5]; proposed the 13th Amendment to the Constitution to abolish slavery throughout the United States[6]; and proposed the 14th Amendment to the Constitution.

In *United States* v. *Wong Kim Ark*, 169 U.S. 649, 675, this Court, after referring to the Civil Rights Act of 1866 (14 Stat. 27) and to the Thirty-ninth Congress which enacted it, said of the 14th Amendment to the Constitution:

> "The same Congress, shortly afterwards, evidently thinking it unwise, and perhaps unsafe, to leave so important a declaration of rights to depend upon an ordinary act of legislation, which might be repealed by any subsequent Congress, framed the 14th Amendment of the Constitution, and on June 16, 1866, by joint resolution proposed it to the legislatures of the several states; and on July 28, 1868, the Secretary of State issued a proclamation showing it to have been ratified by the legislatures of the requisite number of states. 14 Stat. at L. 358; 15 Stat. at L. 708. * * * Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott* v. *Sandford* (1857) 60 U.S. 19 How. 393, and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States."

In the light of these Congressional enactments and constitutional amendments, it is clear that the Legislative Assembly in enacting the two Acts here in question merely implemented the legislative policy which Congress had formulated.

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[3] Act approved May 21, 1862, 12 Stat. 407 (App. 5).
[4] Act approved March 3, 1865, 13 Stat. 536 (App. 5).
[5] Act approved January 8, 1867, 14 Stat. 375 (App. 5).
[6] Resolution approved February 1, 1865, 13 Stat. 567; adopted December 18, 1865, 13 Stat. 774.

In his dissenting opinion Judge Fahy said (R. 101, 102):

> "There can be no question Congress could constitutionally delegate to the Legislative Assembly power to enact regulations of a municipal or local character."

and demonstrated that the Acts of 1872 and 1873 are of that class:

> "They regulate a local activity, the serving of food at a fixed location within the District. This is the sort of thing which in the several states, unless there is state-wide law to the contrary, is appropriately left to municipal authority. This is so not merely because the law applies only to a local area; it is local by other standards as well. Such a regulation is one which the immediate governing body of a municipality, a city council for example, is likely to make its own concern. Higher authority, either a state legislature or, as here, Congress, may legislate upon the subject, but until it does local initiative may deal with it in accordance with the local point of view as to what is conducive to the peace, order, morals, or welfare of the community.
>
> "Under this approach it seems plain the equal service provisions must be considered municipal or local. They represent the views of the Legislative Assembly as to how this matter should be regulated within the District of Columbia. They do not affect the general criminal law, or the descent or other disposition of property, or domestic relations, or the law of contracts or of torts, or interstate commerce, or any other matter commonly regulated by general law, but the serving of persons in licensed eating places in the local community. There is no necessity that eating places should be subject to identical regulations in all the cities of any one state. To hold that a municipality is not competent to regulate the subject would create a serious gap in the power of a community to govern itself in a matter of local concern."

The District of Columbia adopts as its own and incorporates herein by reference the arguments, authorities and citations

of municipal regulations in Judge Fahy's opinion (R. 102-120).

On the basis of all of the foregoing, it is submitted that Congress could constitutionally delegate to the Legislative Assembly power to enact the Acts of 1872 and 1873.

2. Congress Did Delegate to the Legislative Assembly Authority to Enact the Acts of 1872 and 1873

From the very beginning, Congress delegated to the municipal government of the District of Columbia authority to regulate ordinaries,[7] as public eating and drinking establishments were then known. By successive Acts, Congress authorized the Councils of the City of Washington " * * to provide for licensing and regulating * * retailers or liquors," * * "; " * * to license and regulate, exclusively * * ordinary keepers * * * "; " * * to provide for licensing, taxing, and regulating * * ordinaries and taverns * * "[8][9][10]. This regulatory authority was continued in force for the term of twenty years "or until Congress shall by law determine otherwise" by the Act approved May 17, 1848 (App. 4), and was in force at the time of creation of the Legislative Assembly.

In the exercise of that authority, the Council of the City

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[7] "The 'Ordinary.'—The earliest predecessors in England of the modern restaurant were the old coffee-houses and taverns which had a daily 'ordinary'—a mid-day dinner or supper, generally noted for a particular dish, and served at a common table at a fixed price and time. Some of the more ancient of these arose in the middle of the 17th century.

* * * * * *

"Reference to the 'ordinaries' may be found as long ago as 1577 (Hollinshed). In the 17th century the more expensive ordinaries were frequented by men of fashion, and gambling usually followed, so that the term 'ordinary,' by which was understood either the establishment or the meal was then more synonymous with the gambling house than the tavern. * * *

"The early American eating places were patterned after the inns, taverns and coffee houses in England and on the Continent. * * *"

Encyclopedia Britannica "Restaurant" (14th Ed.).

[8] Act approved May 3, 1802 (App. 2).

[9] Act approved February 24, 1804 (App. 3).

[10] Act approved May 15, 1820 (App. 4).

of Washington adopted ordinances regulating every phase of the business of ordinaries and taverns (App. 17-23), including the prohibition of the sale of liquor to Negroes between sunset and sunrise (App. 19).

On March 7, 1870, in conformity with the legislative policy formulated by Congress, supra, the 67th Council of the City of Washington adopted an ordinance (App. 22) which made it unlawful for the proprietors of restaurants and other specified establishments

> "* * to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color."

By Section 40 of the Act approved February 21, 1871, creating the Legislative Assembly, Congress provided:

> "That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A. D. eighteen hundred and seventy-one, and all offices of said corporations abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall remain in full force until modified or repealed by Congress or the legislative assembly of said District; * * *."

Among the ordinances kept in force by this provision was the ordinance approved March 7, 1870, which, as Chief Judge Stephens noted (R. 85), was "substantially paralleled" by the enactments of the Legislative Assembly of 1872 and 1873.

The necessary effect of the action of Congress in keeping in force this ordinance of March 7, 1870, the only purpose of which was to declare the private right of Negroes to patronize restaurants and other establishments, and at the same time authorizing the Legislative Assembly to modify that ordinance, was to delegate to the Legislative Assembly

specific authority to enact legislation of the type and character of the Acts of 1872 and 1873.

3. The Enactments of the Legislative Assembly of 1872 and 1873 Did Not Alter the Common Law

In his opinion Chief Judge Stephens said of the Acts of the Legislative Assembly (R. 79):

> "In requiring restaurant keepers, upon pain of fine and license forfeiture, to serve any respectable, well-behaved person without regard to race, color, or previous condition of servitude, the enactments limit the freedom of the restaurant keeper in the use of his property, in the exercise of his power to contract, and in the carrying on of a lawful calling. Before the enactments, he could choose customers according to his own business or personal desire. The enactments lift restaurant keeping, theretofore strictly a private enterprise, to the level of a 'public employment' — thereby altering the common law, which required inns, but not restaurants, to serve all travellers."

It is submitted that this conclusion is erroneous, but if the common law was altered by the enactments of the Legislative Assembly Congress had authorized the Legislative Assembly to make such alteration.

First, the common law imposed no requirements upon restaurant keepers, for the reason that neither the word nor the establishment "restaurant" was known to the common law. In 1882, in *Lewis* v. *Hitchcock*, 10 Fed. 4, 6, in sustaining a demurrer to a complaint in an action to recover a penalty under the Civil Rights Act of March 1, 1875, (prior to the decision of this Court in the *Civil Rights Cases*, supra) the District Court for the Southern District of New York held:

> "The term 'restaurant' has no definite legal meaning. In Webster's Dictionary it is not even recognized as a word yet Anglicized. As currently understood it doubtless means only, or chiefly, an eating-house."

Both the Council of the City of Washington and the Legislative Assembly regarded "restaurant" and "eating house" as synonymous terms. By the ordinance approved October 31, 1864, the Council of the City of Washington first recognized the existence of "restaurants" and imposed identical requirements on restaurants and eating houses. The first definition locally of "restaurant" is found in the Act of the Legislative Assembly approved August 23, 1871 (App. 12). Seg. 21, Par. Fortieth provided:

> "Every place, the business of which is to provide meals and refreshments, except distilled or fermented liquors, wines, and cordials, for casual visitors, shall be regarded as a restaurant or eating-house."

As was noted above, the common law predecessor of the restaurant was known as an "ordinary". The characteristics of an ordinary were stated by the Supreme Court of Appeals of Virginia in the case of *Talbott* v. *Southern Seminary*, 131 Va. 576, 109 S.E. 440, which was cited by that Court in the case of *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S.E. 2d 906, on which the majority of the United States Court of Appeals relied. In the *Talbott* case the Supreme Court of Appeals of Virginia, referring to a Virginia statute giving proprietors of inns and boarding-houses liens upon property of guests, enacted in 1879, contrasted boarding-houses with other establishments, and said of the ordinary (p. 441):

> "For many years prior to the first enactment, the term 'ordinary' had a well-defined meaning in this state. It was used to designate a public house where food and lodging were furnished to the traveler and his beast, at fixed rates, open to whoever might apply for accommodation, and where intoxicating liquor was sold by retail. It was a house of public entertainment and a common designation of it was a 'tavern'. *** In contrast with this house of public entertainment, usually designated a tavern or hotel, there was also what was known as a boarding house, which was a place of

> private entertainment, where special contracts were usually made for a definite time, and the two terms 'boarding house' and 'private entertainment' were often used interchangeably to mean the same thing."

Examination of the ordinances adopted by the Council of the City of Washington respecting ordinaries and taverns (App. 17-23) shows that the local ordinaries were similar to those described by the Supreme Court of Appeals of Virginia.

Webster's New International Dictionary defines "ordinary" as "a meal served to all comers at a fixed price."

From the foregoing it is clear that the common law counterparts of the restaurant were in fact public employments, catering to "whoever might apply for accommodations" (*Talbott* v. *Southern Seminary*, supra) and to "all comers" (Webster). The only contracts entered into by the proprietors of such establishments with their customers were implied from the fact that the customer applied for the accommodation at the price fixed by the proprietor. The Court of Appeals reached its conclusion by applying to restaurants a principle of the common law applicable to boarding-houses.

Second, it was the common law definition of the "public", which might patronize public eating and drinking establishments, rather than the common law of "restaurants" which was modified, and the alteration of the common law was effected by Congressional legislation and constitutional amendment. In *Dred Scott* v. *Sandford*, 19 How. 393, 407, Mr. Chief Justice Taney referred to "the people or citizens of a State" as synonymous terms. The effect of the 14th Amendment was not only to elevate the Negro to the status of citizen, but to the status of "people", and therefore, to membership in the "public", which Webster defines as "of or pertaining to the people." The enactments of the Legislative Assembly in effect recognized the changed status of the Negro, and far from altering the common law of

"restaurants", required restaurant keepers to conform to the traditional business practices of their common law predecessors, i.e., to accommodate the public, as that term had been re-defined by constitutional amendments and Congressional enactments.

Third, as this Court pointed out in the *Civil Rights Cases*, 109 U. S. 3, supra, the private right to patronize a restaurant is one to be protected by municipal law. It is the duty of the municipal legislature to provide for the general welfare "by any and every act of legislation which it may deem to be conducive" to that end. *City of New York* v. *Miln*, 11 Pet. 102, 139, supra. As we have shown, Congress delegated to the Legislative Assembly authority to enact legislation of the character of the Acts of 1872 and 1873, and that grant of authority necessarily included power to alter the common law.

4. Congress Approved and Legalized the Acts of the Legislative Assembly of 1872 and 1873

In the absence of Congressional action, it could reasonably be inferred that Congress approved the Acts of the Legislative Assembly of 1872 and 1873. Section 4 of the Act approved February 21, 1871 (App. 6) provided "That there shall be appointed by the President, by and with the advice and consent of the Senate, a secretary of said District **; he shall record and preserve all laws and proceedings of the legislative assembly **; he shall transmit ** semiannually ** four copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress**". Sec. 18 of the Act of February 21, 1871 (App. 8) delegated legislative power to the Legislative Assembly, subject to the reservation, "**but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States**".

In *Clinton* v. *Engelbrecht*, 80 U.S. 13 Wall. 434, 446, the

Court in holding that the law of the territorial legislature of the Territory of Utah, prescribing the mode of obtaining panels of grand and petit jurors was obligatory upon the district courts of the territory, said:

> "In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws, on or before the first of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Again in *Tiaco* v. *Forbes*, 228 U.S. 549, 557, the Court expressed the same thought. In that case Mr. Justice Holmes, speaking for the Court and referring to an Act of the Philippine Legislature of April 19, 1910, said:

> "By §86 of the Act of July 1, 1902, all laws passed by the Philippine Government are to be reported to Congress, which reserves power to annul them. It is worthy of mention that the law under consideration was reported to Congress and has not been annulled."

But the approval and legalization by Congress of the enactments of the Legislative Assembly do not depend on mere inference. Section 2 of the Act approved February 21, 1871, made it the duty of the Governor of the District of Columbia to "take care that the laws be faithfully executed." Necessarily, it was the duty of the Governor to take care that the ordinance adopted March 7, 1870, supra, which had been kept in force by Section 40 of the same Act which created his office, be faithfully executed, as well as the Acts of the Legislative Assembly of 1872 and 1873 which amended and strengthened that ordinance.

When Congress, by the Act approved June 20, 1874,

abolished the Legislative Assembly and created the Temporary Commission Government, it charged the Commissioners thereby provided for with the duty of exercising "all the power and authority now lawfully vested in the governor" of the District. Section 91 of the Revised Statutes of the District of Columbia, approved June 22, 1874, made that duty specific. That section provided:

> "All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

The Revised Statutes were followed by the present Organic Act of the District of Columbia, approved June 11, 1878, 20 Stat. 102. Section 1 of that Act provided that "all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect."

By this series of enactments, Congress not only approved the enactments of the Legislative Assembly here in question; it precluded the possibility of repeal of those enactments other than by Act of Congress. In *Metropolitan Railroad Company* v. *District of Columbia*, 132 U.S. 1, 7, supra, this Court, referring to the Organic Act of the District of Columbia, approved June 11, 1878, and to the Commission Government of the District of Columbia created thereby, said:

> "Under these different changes the administration of the affairs of the District of Columbia and City of Washington has gone on in much the same way, except a change in the depositaries of power, and in the extent and number of powers conferred upon them. *Legislative powers have now ceased*, and the municipal gov-

ernment is confined to mere administration. (Emphasis supplied.)

Not until 1892 did Congress again vest in the municipal government local legislative power. By the Joint Resolution approved February 26, 1892, 27 Stat. 394, Congress provided:

> "Sec. 2. That the Commissioners of the District of Columbia are hereby authorized and empowered to make and enforce all such reasonable and usual police regulations ** as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia."

In his separate opinion, Judge Prettyman, referring to the Joint Resolution of 1892, supra, said (R. 92, f.n.7):

> "Since 1878 the Board of Commissioners has been the governing body of the District of Columbia, which is a municipal corporation. They have had the power both to make [7] and to enforce municipal regulations and generally to exercise all the usual powers of a municipal corporation. Theirs have been the powers of local ordinance-making and of law enforcement. They could repeal what they could enact.
>
> "[7] 27 STAT. 394 (1892), D. C. CODE § 1-226 (1951). Since 1902 they have had specific power to require licenses for businesses or callings. 32 STAT. 622 (1902), as amended, D. C. CODE § 47-2344 (1951)."

Thus, following approval of the Joint Resolution of 1892, supra, the Commissioners of the District of Columbia had authority to repeal the enactments of the Legislative Assembly of 1872 and 1873, *Stevens* v. *Stoutenburgh*, 8 App. D. C. 513. They did not repeal them. Those enactments accordingly were in full force and effect at the time of enactment of the District of Columbia Code of 1901.

After the enactment of the 1901 Code, the Commissioners of the District of Columbia no longer had power to repeal

those enactments. The last paragraph of Section 1636, the repeal section of that Code, provides:

> "All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

Section 1640 of that Code provides:

> "Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia ** of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

By these provisions Congress gave to the enactments of the Legislative Assembly, which it saved from repeal and reaffirmed, a status similar to that of Acts of Congress, in that Congress alone could thereafter amend or repeal them.

5. The Acts of the Legislative Assembly of 1872 and 1873 Were Not Repealed by the 1901 Code of Law for the District of Columbia

On the basis of their conclusion that the Acts of 1872 and 1873 constituted "general" legislation, the four judges for whom Chief Judge Stephens wrote reached the further conclusion that the Acts were repealed by the District of Columbia Code of 1901, 31 Stat. 1189. Judge Prettyman, as an alternative ground for concurring in the result, stated that, if the Acts "were general legislation they were void from the beginning and in any event were repealed by the 1901 Code." (R. 99)

It is respectfully submitted that this conclusion as to the effect of the 1901 Code is erroneous. It should be emphasized at the outset that the 1901 Code did not specifically or expressly repeal these two Acts. On the contrary, the

conclusion that the Acts were repealed is based upon certain general provisions of the Code. It is pertinent, therefore, to recall the admonition frequently made by this Court that "repeals by implication are not favored" and that the "intention of the legislature to repeal must be clear and manifest." *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, and numerous authorities there cited.

Section 1636 of the 1901 Code, upon which the opinion of Chief Judge Stephens mainly relied, repealed "All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia * * * in force in said District on the day of the passage of this act * * * except: * * *

> "Third: Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

The Acts of the Legislative Assembly of 1872 and 1873 were clearly saved from repeal by the language of Section 1636. Both imposed duties upon the Commissioners of the District of Columbia, as the successors of the Governor of the District of Columbia, and upon subordinates of the Commissioners—the successors in office or duty of the Register and the attorneys of the District of Columbia. Both enactments were "police regulations," as that term was defined by the Court of Appeals in *United States* v. *Cella*, 37 App. D. C. 433, 435:

> "A municipal ordinance or police regulation is peculiarly applicable to the inhabitants of a particular place; in other words, it is local in character. While municipal ordinances or police regulations are binding upon the

> community affected by them, they do not emanate from the supreme power of the state, which is the exclusive source of all general legislation."

See also *Johnson* v. *District of Columbia*, 30 App. D. C. 520, holding that an Act of the Legislative Assembly prohibiting cruelty to animals was a "mere police regulation" and hence saved from repeal under Section 1636 of the 1901 Code.

Both enactments in this case deal with the regulation of licensed public eating places, which Congress, by its enactments from the Act of May 3, 1802, 2 Stat. 195, to the present time, had committed to the regulatory authority of the local District governments. Both enactments related to municipal affairs only, as we have shown above.

Section 1640 of the 1901 Code provided:

> "Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia * * * of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

The enactments of the Legislative Assembly of 1872 and 1873 are simply the ordinance of the Council of Washington of March 7, 1870, as modified by the Legislative Assembly. The Court of Appeals held that they "substantially paralleled" that ordinance (R. 85).

In the case of *Barnes* v. *District of Columbia*, 91 U.S. 540, supra, this Court said (p. 555):

> "Names are not things. Perhaps there is no restriction on the power of Congress to create a State within the limits of the District of Columbia; but it does not make an organization a State to call its mayor a Governor, or its common council a legislative Assembly, or its superintendent of streets a Board of Public Works, especially when the statute by which they are created

opens with a declaration of its intention to create a municipal corporation."

By the same reasoning, the ordinance of March 7, 1870, was not converted into a statute by reason of the fact that the common council which amended and strengthened it was called a Legislative Assembly.

Clearly, by enacting Section 1640 of the 1901 Code, Congress intended that such municipal ordinances as these enactments should remain in force until Congress itself modifies or repeals them. This Congress has never done.

Judge Prettyman's alternative ground, that the 1872 and 1873 Acts are no longer effective because they were abandoned through non-enforcement, is plainly without merit. It is elementary that "failure to enforce the law does not change it." *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759; *Kelly* v. *Washington*, 302 U. S. 1, 14; *Chicago B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155, 162.

CONCLUSION

The common councils of the City of Washington, from 1802 to 1871, were elected by the citizens of the city. The members of the House of Delegates, the more numerous branch of the Legislative Assembly, were elected by the citizens of the District of Columbia. When it is considered that on three separate occasions elected representatives of the people enacted ordinances prohibiting discriminatory treatment of Negroes by licensed establishments catering to the public, there can be no question that in 1870, 1872, and 1873 the majority of the people of the District of Columbia wanted to end such discrimination. These anti-discrimination enactments were transmitted to Congress in accordance with law and Congress not only did not repeal them but by Section 91 of the Revised Statutes of the District of Columbia kept them in force, as modified by the Legislative Assembly. A bill, H.R. 5307, 82d Congress, 1st Ses-

sion, introduced September 12, 1951, the sole purpose of which was to repeal the Acts of the Legislative Assembly of 1872 and 1873, failed of passage.

The purpose of the enactments was to give Negroes their full rights as citizens. They are municipal in character, local in application. They were validly enacted. They have never been repealed.

It is respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed with directions that the case be remanded to the Municipal Court for trial on the merits.

Respectfully submitted,

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APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

OTHER AUTHORITIES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Article 1, Section 8, Clause 17:

> "The Congress shall have Power ***
>
> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;— "

Article 4, Section 3:

> "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.
>
> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

13th Amendment. "e"

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

"e *** Ratification was completed on December 6, 1865 ***. On December 18, 1865, Secretary of State Seward certified that the 13th amendment had become a part of the Constitution ***."

Constitution of the United States of America, Revised and Annotated, 1938, p. 42.

14th amendment. "*f*"

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"*f* *** On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. ***"

Id. p. 43.

Acts of Congress

"An Act for establishing the temporary and permanent seat of the Government of the United States", approved July 16, 1790, 1 Stat. 130:

"Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That a district of territory, not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."

"An Act to incorporate the inhabitants of the city of Washington, in the District of Columbia", approved May 3, 1802, 2 Stats 195 (p. XXVIII, D.C. Code, 1951):

"That the inhabitants of the city of Washington be constituted a body politic and corporate, by the name of a mayor and council of the city of Washington, ***.

"Sec. 2. That the council of the city of Washington shall consist of twelve members, residents of the city, and upwards of twenty-five years of age, to be divided into two chambers, the first chamber to consist of seven members, and the second chamber of five members; the second chamber to be chosen from the whole number of councillors elected, by their joint ballot. The city council to be elected annually, by ballot, in a general ticket, by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held: ***."

"Sec. 7. That the corporation aforesaid shall have full power and authority to pass all by-laws and ordinances; *** to provide for licensing and regulating auctions, retailers of liquors, ***; to restrain or prohibit gambling, and to provide for licensing, regulating or restraining theatrical or other public amusements within the city; *** to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; ***."

"An Act supplementary to an act entitled 'An Act to incorporate the inhabitants of the City of Washington, in the District of Columbia'", approved February 24, 1804, 2 Stat. 254:

"Sec. 3. *And be it further enacted*, That the council shall have power to establish and regulate the inspection of flour, tobacco, and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread; to tax and license hawkers and pedlers, to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; to superintend the health of the city, to preserve the navigation of the Potomac and Anacosta rivers, adjoining the city; to erect, repair, and regulate public wharves, and to deepen docks and basins; to provide for the establishment and superin

tendence of public schools; to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries; to provide for the appointment of inspectors, constables and such other officers as may be necessary to execute the laws of the corporation; and to give such compensation to the mayor of the city as they may deem fit."

"An Act to incorporate the inhabitants of the city of Washington, and to repeal all acts heretofore passed for that purpose", approved May 15, 1820, 3 Stat. 583, (p. XXXIII, D. C. Code, 1951).

"Sec. 7. That the corporation aforesaid shall have full power and authority *** to provide for licensing, taxing, and regulating *** ordinaries, and taverns, *** to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; *** to impose and appropriate fines, penalties, and forfeitures, for the breach of their laws or ordinances; *** ".

"An Act to continue, alter and amend the charter of the city of Washington", approved May 17, 1848, 9 Stat. 223 (p. XXXVII, D.C. Code, 1951), Section 1.

"That the act of May fifteenth, eighteen hundred and twenty, entitled, 'An Act to incorporate the inhabitants of the City of Washington, and to repeal all acts heretofore passed for that purpose,' and the act of May twenty-sixth, eighteen hundred and twenty-four, entitled 'An Act supplementary to "An Act to incorporate the inhabitants of the city of Washington," passed the fifteenth of May, one thousand eight hundred and twenty, and for other purposes,' and the act or acts supplemental or additional to said acts which were in force on the fourteenth day of May, eighteen hundred and forty, or which may, at the passing of this act, be in force, be and the same are hereby continued in force for the term of twenty years from the date hereof, or until Congress shall by law determine otherwise, with the alterations, additions, explanations, and amendments following, that is to say: *** "

"An Act for the Release of certain Persons held to Service or Labor in the District of Columbia", approved April 16, 1862, 12 Stat. 376, Section 1.

"That all persons held to service or labor within the District of Columbia by reason of African descent are hereby discharged and freed of and from all claim to such service or labor; and from and after the passage of this act neither slavery nor involuntary servitude, except for crime, whereof the party shall be duly convicted, shall hereafter exist in said District."

"An Act providing for the Education of Colored Children in the Cities of Washington and Georgetown, District of Columbia, and for other Purposes", approved May 21, 1862, 12 Stat. 407.

"Sec. 4. *And be it further enacted*, That all persons of color in the District of Columbia, or in the corporate limits of the cities of Washington and Georgetown, shall be subject and amenable to the same laws and ordinances to which free white persons are or may be subject or amenable; that they shall be tried for any offenses against the laws in the same manner as free white persons are or may be tried for the same offences; and that upon being legally convicted of any crime or offence against any law or ordinance, such persons of color shall be liable to the same penalty or punishment, and no other, as would be imposed or inflicted upon free white persons for the same crime or offence; and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed."

"An Act to amend an Act entitled 'An Act to incorporate the Metropolitan Railroad Company in the District of Columbia'", approved March 3, 1865, 13 Stat. 536.

"Sec. 5. *And be it further enacted*, That the provision prohibiting any exclusion from any car on account of color, already applicable to the Metropolitan Railroad, is hereby extended to every other railroad in the District of Columbia."

"An Act to regulate the elective franchise in the District of Columbia", passed over veto January 8, 1867, 14 Stat. 375 (p. XLIV, D. C. Code, 1951), Section 1.

"That, from and after the passage of this act, each and every male person, excepting paupers and persons

under guardianship, of the age of twenty-one years and upwards, who has not been convicted of any infamous crime or offence, and excepting persons who may have voluntarily given aid and comfort to the rebels in the late rebellion, and who shall have been born or naturalized in the United States, and who shall have resided in the said District for the period of one year, and three months in the ward or election precinct in which he shall offer to vote, next preceding any election therein, shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote at any election in said District, without any distinction on account of color or race."

"AN ACT to provide a government for the District of Columbia", approved February 21, 1871, 16 Stat. 419 (p. XLV, D.C. Code, 1951):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all that part of the territory of the United States included within the limits of the District of Columbia be, and the same is hereby, created into a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act."

"Sec. 4. *And be it further enacted*, That there shall be appointed by the President, by and with the advice and consent of the Senate, a secretary of said District, who shall reside therein and possess the qualification of an elector, and shall hold his office for four years, and until his successor shall be appointed and qualified; he shall record and preserve all laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session, and one copy of the executive proceedings and official corre-

spondence semiannually, on the first days of January and July in each year, to the President of the United States, and four copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress; and in case of the death, removal, resignation, disability, or absence, of the governor from the District, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy, disability, or absence, or until another governor shall be duly appointed and qualified to fill such vacancy. And in case the offices of governor and secretary shall both become vacant, the powers, duties, and emoluments of the office of governor shall devolve upon the presiding officer of the council, and in case that office shall also be vacant, upon the presiding officer of the house of delegates, until the office shall be filled by a new appointment."

"Sec. 5. *And be it further enacted*, That legislative power and authority in said District shall be vested in a legislative assembly as hereinafter provided. The assembly shall consist of a council and house of delegates. The council shall consist of eleven members, of whom two shall be residents of the city of Georgetown, and two residents of the county outside of the cities of Washington and Georgetown, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall have the qualification of voters as hereinafter prescribed, five of whom shall be first appointed for the term of one year, and six for the period of two years, provided that all subsequent appointments shall be for the term of two years. The house of delegates shall consist of twenty-two members, possessing the same qualifications as prescribed for the members of the council, whose term of service shall continue one year. An apportionment shall be made, as nearly equal as practicable into eleven districts for the appointment of the council, and into twenty-two districts for the election of delegates, giving to each section of the District representation in the ratio of its population as nearly as may be. And the members of the council and of the house of delegates shall reside

in and be inhabitants of the districts from which they are appointed or elected, respectively. *** "

"Sec. 7. *And be it further enacted*, That all male citizens of the United States, above the age of twenty-one years, who shall have been actual residents of said District for three months prior to the passage of this act, except such as are non compos mentis and persons convicted of infamous crimes, shall be entitled to vote at said election, in the election district or precinct in which he shall then reside, and shall have so resided for thirty days immediately preceding said election, and shall be eligible to any office within the said District, and for all subsequent elections twelve months' prior residence shall be required to constitute a voter; but the legislative assembly shall have no right to abridge or limit the right of suffrage."

"Sec. 17. *And be it further enacted*, That the legislative assembly shall not pass special laws in any of the following cases, that is to say: For granting divorces; regulating the practice in courts of justice; regulating the jurisdiction or duties of justices of the peace, police magistrates, or constables; providing for changes of venue in civil or criminal cases, or swearing and impaneling jurors; remitting fines, penalties, or forfeitures; the sale or mortgage of real estate belonging to minors or others under disability; changing the law of descent; increasing or decreasing the fees of public officers during the term for which said officers are elected or appointed; granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise whatsoever. The legislative assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to the District or to any municipal corporation therein, nor shall the legislative assembly have power to establish any bank of circulation, nor to authorize any company or individual to issue notes for circulation as money or currency.

"Sec. 18. *And be it further enacted*, That the legislative power of the District shall extend to all rightful

subjects of legislation within said District, consistent with the Constitution of the United States and the provisions of this act, subject, nevertheless, to all the restrictions and limitations imposed upon States by the tenth section of the first article of the Constitution of the United States; but all acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress of the United States, and nothing herein shall be construed to deprive Congress of the power of legislation over said District in as ample manner as if this law had not been enacted."

"Sec. 20. *And be it further enacted*, That the said legislative assembly shall not have power to pass any ex post facto law, nor law impairing the obligation of contracts, nor to tax the property of the United States, nor to tax the lands or other property of non-residents higher than the lands or other property of residents; nor shall lands or other property in said district be liable to a higher tax, in any one year, for all general objects, territorial and municipal, than two dollars on every hundred dollars of the cash value thereof; but special taxes may be levied in particular sections, wards, or districts for their particular local improvements; nor shall said territorial government have power to borrow money or issue stock or bonds for any object whatever, unless specially authorized by an act of the legislative assembly, passed by a vote of two thirds of the entire number of the members of each branch thereof, but said debt in no case to exceed five per centum of the assessed value of the property of said District, unless authorized by a vote of the people, as *hereinafter* (hereinbefore) provided."

"Sec. 40. *And be it further enacted*, That the charters of the cities of Washington and Georgetown shall be repealed on and after the first day of June, A.D. eighteen hundred and seventy-one, and all offices of said corporation abolished at that date; the levy court of the District of Columbia and all offices connected therewith shall be abolished on and after said first day of June, A. D. eighteen hundred and seventy-one; but all laws and ordinances of said cities, respectively, and of said levy court, not inconsistent with this act, shall re-

main in full force until modified or repealed by Congress or the legislative assembly of said District; * * *."

Revised Statutes of the District of Columbia, approved June 22, 1874:

"Sec. 91. All laws and ordinances of the cities of Washington and Georgetown, respectively, and of the levy court of the District of Columbia, not inconsistent with this chapter, and except as modified or repealed by Congress or the legislative assembly of the District since the first day of June, eighteen hundred and seventy-one, or until so modified or repealed, remain in full force."

Code of Law for the District of Columbia, approved March 3, 1901, 31 Stat. 1189:

"Sec. 1636. All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:"

"Third. Acts and parts of acts relating to the organization of the District government, or to its obligations, or the powers or duties of the Commissioners of the District of Columbia, or their subordinates or employees, or to police regulations, and generally all acts and parts of acts relating to municipal affairs only, including those regulating the charges of public-service corporations."

"Fifth. All penal statutes authorizing punishment by fine only or by imprisonment not exceeding one year, or both."

"Eighth. An act to regulate the practice of pharmacy in the District of Columbia, approved June fifteenth, eighteen hundred and seventy-eight; an act for the regulation of the practice of dentistry in the

District of Columbia, and for the protection of the people from empiricism in relation thereto, approved June sixth, eighteen hundred and ninety-two; an act regulating the construction of buildings along alleyways in the District of Columbia, approved July twenty-second, eighteen hundred and ninety-two; an act for the promotion of anatomical science, and to prevent the desecration of graves in the District of Columbia, approved February twenty-sixth, eighteen hundred and ninety-five; an act to provide for the incorporation and regulation of medical and dental colleges in the District of Columbia, approved May fourth, eighteen hundred and ninety-six; an act relating to the testimony of physicians in the courts of the District of Columbia, received by the President May thirteenth, eighteen hundred and ninety-six; an act to regulate the practice of medicine and surgery, to license physicians and surgeons, and to punish persons violating the provisions thereof in the District of Columbia, approved June third, eighteen hundred and ninety-six; and, generally, all acts or parts of acts relating to medicine, dentistry, pharmacy, the commitment of the insane to the Government Hospital for the Insane in the District of Columbia, the abatement of nuisances, and public health."

"All acts and parts of acts included in the foregoing exceptions, or any of them, shall remain in force except in so far as the same are inconsistent with or are replaced by the provisions of this code."

"Sec. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of the principles of equity or admiralty, or of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

Enactments of the Legislative Assembly

Act of the First Legislative Assembly approved August 23, 1871, Laws of the District of Columbia, Chap. LXIX, p. 87:

"*An Act imposing a license on trades, business, and professions practiced or carried on in the District of Columbia.*"

Sec. 21, Par. Fortieth:

"Proprietors of restaurants and eating-houses shall pay twenty-five dollars annually. Every place, the business of which is to provide meals and refreshments, except distilled or fermented liquors, wines, and cordials, for casual visitors, shall be regarded as a restaurant or eating-house."

"Sec. 24. *And be it further enacted*, That all laws and ordinances of the corporations of Washington and Georgetown and the Levy Court, providing police regulations for the several businesses of the citizens of the District of Columbia, are hereby continued in force; and all acts and ordinances, or parts of the same, of the said corporations of Washington and Georgetown and the Levy Court and the District of Columbia, inconsistent with the provisions of this act, are hereby repealed; and whereas an emergency exists, this act shall go into effect immediately on and after its passage."

Act of the Second Legislative Assembly approved June 20, 1872, Laws of the District of Columbia, Chap. LI, p. 65:

"*An Act regulating restaurants, and other public places, and for other purposes.*

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That keepers or owners of restaurants, eating-houses, bar-rooms, or ice-cream saloons, or soda-fountains, at which food, refreshments or drinks are sold, or keepers of barber shops and bathing houses, must put in a conspicuous place in their restaurant, eating-houses, ice-cream saloons, or places for the sale of soda water, a scale of the prices for which

the different articles they have for sale will be furnished.

"Sec. 2. *And be it further enacted*, That persons violating the provisions of the above section are to be deemed guilty of misdemeanor, and, upon conviction in a court having jurisdiction, are to be fined by the court not less than twenty dollars, and not more than fifty dollars.

"Sec. 3. *And be it further enacted*, That any restaurant keeper or proprietor, any hotel keeper or proprietor, proprietors or keepers of ice-cream saloons or places where soda-water is kept for sale, or keepers of barber shops and bathing houses, refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous condition of servitude, or any restaurant, hotel, ice-cream saloon or soda fountain, barber shop or bathing-house keepers, or proprietors, who refuse under any pretext to serve any well-behaved, respectable person, in the same room, and at the same prices, as other well-behaved and respectable persons are served, shall be deemed guilty of a misdemeanor, and upon conviction in a court having jurisdiction, shall be fined one hundred dollars, and shall forfeit his or her license as keeper or owner of a restaurant, hotel, ice-cream saloon, or soda fountain, as the case may be, and it shall not be lawful for the Register or any officer of the District of Columbia to issue a license to any person or persons, or to their agent or agents, who shall have forfeited their license under the provisions of this act, until a period of one year shall have elapsed after such forfeiture."

Act of the Third Legislative Assembly approved June 26, 1873, Laws of the District of Columbia, Chap. XLVI, p. 116;

"*An Act regulating sales in restaurants, eating-houses, bar-rooms, sample-rooms, ice-cream saloons, and soda-fountain rooms; providing for posting up the ordinary prices for which sales shall or may be made in said establishments, requiring all persons respectable and well-behaved to be accommodated in said establishments at said prices and in the same rooms,*

and providing penalties to secure the regulation of sales in said establishments, and for the enforcement of this act.

"*Be it enacted by the Legislative Assembly of the District of Columbia*, That the proprietor or proprietors, or keeper or keepers, of every licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or establishment in the District of Columbia, shall put up, or cause to be put up, and to be regularly kept up, or cause to be kept up, in two conspicuous places in the chief room or rooms of his, her, or their restaurant, eating-house, bar-room, ice-cream saloon, or soda fountain room, and in one conspicuous place in each small or private room, if any, used in connection with said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room, for the accommodation of guests, visitors, or customers thereat, printed cards, or papers, on which shall be distinctly printed the common or usual price for which each article or thing kept in any of said places or establishments to be eaten or drank therein is or may be commonly sold, or the price or prices for which the articles or things are or may be commonly or usually furnished to persons calling for, desiring, or receiving the same or any part or parts thereof, and no greater price or prices than those mentioned or contained on said cards or printed papers shall be asked for, demanded, or received from any person or persons for any of the articles or things kept in any manner for sale in any of the places or establishments aforesaid, either by said proprietor or proprietors, keeper or keepers, or by their agents, employés, or any one acting in any manner for them.

"SEC. 2. *And be it further enacted*, That on or before the first day of November in each year the proprietor or proprietors, keeper or keepers, of each licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, and soda-fountain room or establishment in said District, as aforesaid, shall transmit to the Register of said District a printed copy of the usual or common price or prices of articles or things kept for sale by him, her, or them, as aforesaid, which shall

be filed by the Register in his office, and unless he is notified of changes therein, the copy transmitted and filed in said office may be used in any case or proceeding under this act as prima facie evidence of the common or usual prices charged for the articles or things mentioned therein by the proprietor or proprietors, keeper or keepers, of any of the places or establishments aforesaid, and in a failure of any proprietor or proprietors, keeper or keepers, to transmit the copy aforesaid, the Register shall notify such person of such failure, and require such copy to be forthwith transmitted to him.

"Sec. 3. *And be it further enacted*, That the proprietor or proprietors, keeper or keepers, of any licensed restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room shall sell at and for the usual or common prices charged by him, her, or them, as contained in said printed cards or papers, any article or thing kept for sale by him, her, or them to any well-behaved and respectable person or persons who may desire the same, or any part or parts thereof, and serve the same to such person or persons in the same room or rooms in which any other well-behaved person or persons may be served or allowed to eat or drink in said place or establishment: *Provided*, That persons of different sexes shall not be accommodated in the same room or rooms unless they accompany each other, or call for any articles or things together, or unless said room or rooms are ordinarily used indiscriminately by persons of both sexes.

"Sec. 4. *And be it further enacted*, That if the proprietor or proprietors, keeper or keepers, of any place or establishment, as aforesaid, shall neglect or refuse to put up printed cards or papers of prices as provided for in the first section of this act, or shall refuse to send a copy or duplicate to the Register, as provided in the second section, or shall place or cause to be placed on said card or paper, or permit to be placed thereon any price or prices other or greater than that for which any article or thing is, or may be, usually and commonly sold or furnished by him, her, or them, or different from or more than is usually or commonly

demanded or received therefor by him, her, or them, or by his, her, or their authority or direction, or shall demand or receive in any manner, or under any circumstances, or for any reason or pretence, in person or by any employé or agent, from any person or persons aforesaid, any sum or prices different or greater than is contained on said cards or papers, or than is usually and commonly asked or received for any article or thing kept for sale as aforesaid, or shall refuse or neglect, in person or by his, her, or their employé or agent, directly or indirectly, to accommodate any well-behaved and respectable person as aforesaid in his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, or shall refuse or neglect to sell at the common and usual prices aforesaid in and at his, her, or their restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, to any such person or persons therein at said prices, any article or thing kept therein and in the room or rooms in which such articles or things are ordinarily sold and served or allowed to be eaten or drank, or shall at any time or in any way or manner, or under any circumstances, or for any reason, cause, or pretext, fail, decline, object, or refuse to treat any person or persons aforesaid as any other well-behaved and respectable person or persons are treated at said restaurant, eating-house, bar-room, sample-room, ice-cream saloon, or soda-fountain room, he, she, or they, on conviction of a disregard or violation of any provision, regulation, or requirement of this act or any part of this act contained, be fined one hundred dollars, and forfeit his, her, or their license; and it shall not be lawful for any officer of the District to issue a license to any person or persons, or their agent or agents, whose license may be forfeited under the provisions of this act for one year after such forfeiture: *Provided*, That the provisions of this act shall be enforced by information in the Police Court of the District of Columbia, filed on behalf thereof by its proper attorney or attorneys, subject to appeal to the Criminal Court of the District of Columbia in the same manner as is now or may be hereafter provided for the enforcement of the District fines and penalties under ordinances and law.

"Sec. 5. *And be it further enacted*, That all acts and parts of acts inconsistent herewith are hereby repealed."

Corporation Laws of Washington, D. C.

FIRST COUNCIL. "An Act requiring annual licenses to be taken out by pedlars and ordinary keepers; and for the keeping of Carriages and Billiard tables", approved May 25, 1803, p. 45, Chap. XXVII[1] (Section 1).

"That after the first day of July next, licenses to remain in force for one year from their respective dates, and to be annually thereafter renewed, shall be taken out for the following objects, for which the annexed sums shall be paid by the person obtaining the same, to wit:

* * * * * * *

"For keeping an ordinary, sixteen dollars."

THIRD COUNCIL. "An Act requiring annual licenses to be taken out by ordinary or tavern keepers, retailers, and hawkers or pedlars", approved July 19, 1804, p. 4.[2]

"Sec. 2. That every person applying for a tavern or ordinary license, shall produce to the mayor good and satisfactory testimonials that he or she hath suitable and proper accommodations for travellers or guests, with at least four good feather beds and bedding, and good stabling for four horses, over and above what is necessary for his or her own use, or the use of his or her own family. And before the license be granted the mayor shall require and receive from the person so applying his or her bond with two citizens approved of by the mayor as sureties in the penal sum of two hundred and fifty dollars each, conditioned for the keeping of such accommodations, bedding and stabling for persons travelling or guests, and for keeping an orderly, quiet and peaceable house."

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[1] Corporation Laws of Washington, D. C., 1, 1-15 Councils, 1802-1818 (Reference No. +K859L, W2741, District of Columbia Public Library).

[2] Id.

"Sec. 5. That for selling liquors in any house other than a tavern, in smaller quantities than a pint, there shall be an annual license first obtained and for which there shall be paid twenty dollars for the use of the city; and the person so applying for license shall produce to the mayor the certificate of at least six inhabitants, householders of the same ward, of the good character of the person so applying, and that they have known him or her for at least six months preceding such application, on which a license shall be granted for one year, and the person to whom such license shall be granted shall give bond with two citizens, approved by the mayor, as sureties, in the penal sum of fifty dollars each, conditioned for the quiet, orderly and peaceable keeping of such house, and that the keeper thereof will not, during the time for which such license shall be granted, suffer any person or persons to play any game of cards, dice or other hazard for money therein, and that he or she will not suffer any apprentice or slave to purchase and drink any wine or spirituous liquors in his or her house, and that the person keeping such house shall not on Sunday sell or suffer to be drank in his or her house any wine or spirituous liquors."

EIGHTH COUNCIL. "An Act to suppress gaming", approved August 16, 1809, p. 4.[3]

"Sec. 4. That every tavern and ordinary keeper, and every retailer of wine and spirituous liquors, having a license from this Corporation for keeping and retailing the same, shall, on being proved as aforesaid, before a single magistrate, to have permitted any E O, A B C, L S D, faro, rolly-bolly, shuffle-board, equality-table, or other device, for the purpose of playing or gaming for money or any thing in lieu thereof, to be set up, kept and played in his or her house or appurtenances thereto, and on being sentenced as aforesaid, to pay the penalty aforesaid, forfeit his or her said license, from the day that judgment shall have been obtained."

[3] Id.

NINTH COUNCIL. "An Act further regulating the granting of licenses to ordinary or tavern keepers, retailers of wines and spirituous liquors, hawkers and pedlers, and owners of hackney carriages", approved December 15, 1810, p. 29, Chap. 17.[4]

"Sec. 3. That from and after the first day of January next, the keepers of ordinaries and taverns, under licenses granted by the mayor, shall be, and they are hereby prohibited from selling spirituous liquors to any slave or other person of color, on Sundays after nine o'clock in the forenoon, under a penalty, for the first offense, of twenty dollars, and the forfeiture of their license, on conviction, for a second infraction of this section."

FIFTEENTH COUNCIL. "An Act supplementary to the Act, entitled 'An Act further regulating the granting of licenses to ordinary or tavern keepers, retailers of wines and spirituous liquors, hawkers and pedlars, and owners of hackney carriages.' ", approved July 2, 1817, p. 6, Chap. 3.[5] (Sec. 1).

"That from and after the passage of this act, it shall not be lawful for the Mayor to issue a license to any person other than a tavern or ordinary keeper, to sell spirituous liquors in smaller quantities than a pint."

FIFTIETH COUNCIL. "An Act to License, Tax and Regulate Taverns and Ordinaries", approved June 3, 1853, Title 4, p. 81, Chap. VII.[6]

"Sec. 8. That all keepers of ordinaries or taverns shall be and they are hereby prohibited from selling spirituous liquors to any slave or other person of color, on any day, between sunset and sunrise; and all keepers of ordinaries or taverns shall be and they are hereby prohibited from selling any kind of spirituous, distilled or fermented liquors on Sunday, and are hereby required to have their bars or other places where liquor

[4] Id.

[5] Id.

[6] Corporation Laws of the City of Washington to the End of Fiftieth Council, Revised and Compiled by James W. Sheahan (1853).

is usually sold closed on Sunday during the entire day and evening, and also between the hours of twelve o'clock p.m. and four o'clock a.m. of all other days in the week; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than ten nor more than twenty dollars, and for the second offense a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor."

"Sec. 12. That all acts and parts of acts heretofore passed by this Corporation, relating to the licensing or regulation of taverns and ordinaries, be and the same are hereby repealed, except so far as they apply to licenses issued under them, and to the regulations and conditions prescribed by them for the government of such licenses, and the fines, penalties and forfeitures incurred under such acts, or any of them."

SIXTY-SECOND COUNCIL. "AN ACT to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses", approved October 31, 1864, General Laws, p. 8, Chap. 9.[7]

"Sec. 4. That every person who shall apply for a restaurant or eating-house license shall produce to the Mayor a certificate signed by the commissioner or person acting as commissioner of improvements and six respectable freeholders residing in the same square, or the next adjacent square, or the square opposite to the one in which such person resides, which certificate shall set forth that the said commissioner or person acting as commissioner and each of the said six respectable freeholders have personally examined the premises for which application for a license is made, and that they are satisfied that the person making application hath provided on said premises suitable and proper accommodations for guests, so that said guests may be supplied with such eatables that they may require at any hour that the same may be called for."

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[7] Corporation Laws of Washington, D. C., 12, 62-65/Councils, 1864-1868 (Reference No. + K859L, W2741, District of Columbia Public Library).

"Sec. 10. That all keepers of hotels, taverns, ordinaries, and restaurants be, and they are hereby prohibited from selling spiritous and fermented liquors, wines, cordials, and all other intoxicating liquors to any minor; and all keepers of hotels, taverns, ordinaries, and restaurants, shall be, and are hereby prohibited from selling any kind of spiritous, distilled, or fermented liquors on Sunday, and they are hereby required to have their bars or other places where liquor is usually sold closed on Sunday during the entire day and evening; and for the first violation of any of the requirements of this section, the person or persons so offending shall be fined not less than twenty nor more than forty dollars, and for the second offence a like fine, and shall forfeit his, her, or their license, which shall be annulled by the Mayor."

SIXTY-FOURTH COUNCIL. "An Act to amend an act entitled 'An act to license, tax, and regulate Hotels, Taverns, Ordinaries, Restaurants, and Tippling-houses,' approved October 31, 1864," approved October 10, 1866, General Laws, p. 6, Chap. 6.[8]

"That the first section, third line, second section, second line, tenth section, second line, and twelfth section, third line, of the act entitled 'An act to license, tax, and regulate hotels, taverns, ordinaries, restaurants, and tippling-houses,' approved October 31, 1864, be, and the same is hereby, amended by inserting in the sections and lines aforesaid the word 'sample-room,' after the word 'restaurant;' and that section four be, and is hereby amended by the addition of the following (after the word 'for' on the last line): 'That every person or persons applying for a license to have and to keep a sample-room, or place where liquors are sold by the bottle or more, to be drank on the premises, shall produce to the Mayor a certificate of the Register of the City, showing the square on which such sample-room is proposed to be kept, and that the party applying for such license has obtained from this Corporation a license to vend wines, liquors, or groceries to an amount not less than two thousand dollars;' and that

[8] Id.

section thirteen be, and is hereby, amended by the addition of the following: 'For a license to keep a sample-room, one hundred dollars,' and the penalty the same as restaurants."

SIXTY-SIXTH COUNCIL. "AN ACT regulating admission to places of public amusement and entertainment", approved June 10, 1869, General Laws, p. 22, Chap. 36.[9]

"*Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington*, That from and after the passage of this act it shall not be lawful for any person or persons who shall have obtained a license from this Corporation for the purpose of giving a lecture, concert, exhibition, circus performance, theatrical entertainment, or for conducting a place of public amusement of any kind, to make any distinction on account of race or color, as regards the admission of persons to any part of the hall or audience-room where such lecture, concert, exhibition, or other entertainment may be given: *Provided*, That any person applying shall pay the regular price charged for admission to such part of the house as he or she may wish to occupy, and shall conduct himself or herself in an orderly and peaceable manner, while on the premises; and any person or persons offending herein shall forfeit and pay to this Corporation for each offense a fine of not less than ten nor more than twenty dollars to be collected and applied as are other fines.

"Sec. 2. *And be it further enacted*, That all acts or parts of acts inconsistent with this act be, and the same are hereby, repealed."

SIXTY-SEVENTH COUNCIL. "An Act to regulate admission to, and accommodation in, licensed houses and places of amusement", approved March 7, 1870, General Laws, p. 22, Chap. 42.[10]

"*Be it enacted by the Board of Aldermen and Board of Common Council of the City of Washington*, That

[9] Corporation Laws of Washington, D. C., 13, 66-68 Councils, 1868-1871 (Reference No. + K859L, W2741, District of Columbia Public Library).

[10] Id.

from and after the passage of this act it shall not be lawful for the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, to refuse to receive, admit, entertain, and supply any quiet and orderly person or persons, or to exclude any person or persons on account of race or color.

"Sec. 2. *And be it further enacted*, That if the keeper, proprietor, or proprietors of any licensed hotel, tavern, restaurant, ordinary, sample-room, tippling-house, saloon, or eating-house, or any agent acting for him or them, shall violate or offend against the provisions of this act, he or they shall be subject to a fine of not less than fifty dollars for each violation thereof, to be recovered in an action of debt, in the name of the Mayor, Board of Aldermen, and Board of Common Council of the city, on information filed before any police magistrate.

"Sec. 3. *And be it further enacted*, That in lieu of the penalties provided in an ordinance entitled 'An Act regulating admission to places of public amusements,' approved June 10, 1869, for the offense therein mentioned, the penalty mentioned in the second section of this act is hereby substituted, and hereafter shall be applicable to and enforced, as herein provided, for any violation of said act of June 10, 1869.

"Sec. 4. *And be it further enacted*, That after the final conviction of any party for the violation of any of the provisions of this act, or of that of June 10, 1869, referred to in the preceding section, and the recovery of the fine, a sum equal in amount to one-half of such fine shall be paid, and warrant drawn in the usual form out of the general fund, to the party who may have been the informer in any such case.

"Sec. 5. *And be it further enacted*, That all acts or parts of acts that are inconsistent with the provisions of this act are hereby repealed."